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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

FRANK L. CARSON, LAWRENCE HATCHER, and STUART E. MINES,
Petitioners,

v.

AMERICAN BRANDS, INC., T/A THE AMERICAN TOBACCO COMPANY; LOCAL 182, TOBACCO WORKERS INTERNATIONAL UNION,
Respondents.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Court of Appeals for the Fourth Circuit erred in holding that an order of the district court, which refused to enter a jointly proposed consent decree on the grounds of its alleged illegality, was not appealable under 28 U.S.C. §1291 as a collateral order pursuant to the Court's decision in Cohen v. Beneficial Industrial Loan Corp., 377 U.S. 541 (1949)?

2. Whether there was error in the Fourth Circuit's holding that the district court's order, which denied approval to a proposed consent decree granting a permanent injunction on the ground of the decree's alleged illegality, was not appealable under 28 U.S.C. §1292(a)(1) as an interlocutory order refusing an injunction?

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 79-1236

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FRANK L. CARSON, LAWRENCE HATCHER,
and STUART E. MINES,

Petitioners,

v.

AMERICAN BRANDS, INC., T/A THE
AMERICAN TOBACCO COMPANY; LOCAL 182,
TOBACCO WORKERS INTERNATIONAL,
TOBACCO WORKERS INTERNATIONAL UNION,

Respondents.

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ON A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

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CITATION TO OPINION BELOW

The opinion of the Court of Appeals for the Fourth Circuit is reported at 606 F.2d 420. The opinion and judgment of the Court of Appeals are set forth in the Appendix to the Petition for a Writ of Certiorari, pp. 1a, 52a. The opinion of the District Court for the Eastern District of Virginia is reported at 446 F.Supp. 790. The opinion and judgment of the District Court are also set forth in the Appendix to the Petition for a Writ of Certiorari, pp. 28a, 51a..

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1). The judgment of the Court of Appeals dismissing the appeal was entered on September 14, 1979. On June 16, 1980, this Court granted the petition for a writ of certiorari limited to Question 1 presented by the petition. On July 24, 1980, the Clerk of the Supreme Court granted petitioners, pursuant to request, until September 2, 1980 in which to file a brief.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth Amendment to the Constitution of the United States.

This case also involves the following federal statutes:

a. 28 U.S.C. §1291

> The court of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

b. 28 U.S.C. §1292(a)

> The court of appeals shall have jurisdiction of appeals from:
>
> (1) Interlocutory orders of the district courts of the United States,

the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court.

c. 42 U.S.C. §2000e-2

(a) It shall be an unlawful employment practice for an employer--

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

....

(c) It shall be an unlawful employment practice for a labor organization--

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

....

(j) Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of

the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

d. Rule 23(e), Federal Rules of Civil Procedure

A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal shall be given to all members of the class in such manner as the court directs.

STATEMENT OF THE CASE

General. On October 24, 1975, petitioners, present and former seasonal employees at the Richmond Leaf Department of the American Tobacco

Company, a subsidiary of American Brands, Inc., which is located in Richmond, Virginia, filed a complaint on behalf of themselves and other black employees at the Richmond Leaf Department.

The complaint charged that defendant American Brands, Inc., defendant Tobacco Workers' International Union, and defendant Local 182 of the Tobacco Workers' International Union, in violation of the Civil Rights Act of 1964, 42 U.S.C. §§2000e, et seq., and 42 U.S.C §1981, discriminatorily denied black workers hiring, promotion, and transfer opportunities and discriminatorily restricted black workers to low paying and otherwise undesirable jobs.

After the conduct of extensive discovery, the district court, on March 1, 1977, certified a class consisting of (1) black persons, currently and formerly employed who were seasonal employees of the American Tobacco Company's Richmond Leaf Department on or after September 9, 1972, and (2) black persons who applied for seasonal employment at the American Tobacco Company's Richmond Leaf Plant on or after September 9, 1972.

The parties reached a settlement of plaintiffs' claims, entered into a proposed consent decree, Joint Appendix 24, and jointly moved for

approval and entry of the proposed decree. The district court denied the motion on the ground that the proposed decree violated the provisions of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§2000e et seq. in that it provided, in the absence of proof that defendants had engaged in racially discriminatory actions or that plaintiffs and class members were victims of racial discrimination by defendants, for preferential treatment of black employees on the basis of race and color. 446 F.Supp. at 788-791.

Additionally, it held that both Title VII and the Fifth Amendment to the Constitution of the United States precluded a district court from placing what it termed a "federal stamp of approval" upon an agreement which provided preferential treatment on the bais of race or color in the absence of proof of discrimination by defendant and in the absence of proof that plaintiff and class members were victims of discrimination. 446 F.Supp. at 784

On May 14, 1979, the United States Court of Appeals for the Fourth Circuit ordered the merits of the appeal to be determined en banc. On September 14, 1979, however, the Court of Appeals ordered the appeal dismissed on the ground that

the order appealed from below was not appealable within the intendment of 28 U.S.C. §§1291 and 1292. Chief Judge Haynsworth and Circuit Judges Winter and Butzner dissented in an opinion holding that the order was appealable and that the consent decree should have been approved.

History of Racial Discrimination. American Brands, Inc., employs 150 seasonal employees and 100 regular, or full-time, employees to process and store leaf tobacco at the Richmond Leaf Department of the American Tobacco Company in Richmond, Virginia.[1/] The seasonal employees, all of whom are black, work between six and nine months during the year. By contrast, regular employees, of whom 34% are white, work throughout the year.[2/] Both the seasonal and regular

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1/ The facts concerning employment statistics of defendant American Brands, Inc. are contained in that defendant's answer to plaintiffs' interrogatories, relevant portions of which are included in the Record below as the parties' Joint Appendix, and are also contained in the opinions below. Moreover, the operation of the American Tobacco Co. is described in Russell v. American Tobacco Co., 528 F.2d 357 (4th Cir. 1975), cert. denied, 425 U.S. 935 (1976).

2/ The following table represents the racial composition of the employees at the Richmond Leaf Department from 1968-1976:

employees are represented by defendant Local 182, Tobacco Workers' International Union (herinafter "T.W.I.U.").

Prior to September 16, 1963, union jurisdiction over job positions at the Richmond Leaf Department was divided betweeen Local 182 of the T.W.I.U. and Local 214 of the T.W.I.U. The former, whose membership was then all white, had exclusive jurisdiction over regular job classifications. Local 214's membership was limited to black employees who were seasonal workers at the Richmond Leaf Department.[3/]

While the existence of two separate unions at the Department was officially terminated on September 16, 1963, the pre-existing patterns of

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2/ (con'd)

Year	Regular Employees		Seasonal Employees	
	Whites	Blacks	Whites	Blacks
1968	41	52	0	116
1970	40	59	0	175
1973	40	56	0	176
1976	37	57	0	135

3/ See defendant American Brand's answer to Interrogatory #14 in Joint Appendix below.

racial discrimination, however, continued in effect at the Richmond Leaf Department as a consequence of regulations and procedures establishing the system of seniority and transfer rights of employees.

Seniority and Transfer Rights.[4/] Prior to September 16, 1963, permanent job vacancies were filled by canvassing the employees within the bargaining unit of the union having jurisdiction of the jobs in which the vacancies existed. This procedure benefitted the white members of Local 182 in the competition for permanent job positions.

Following the 1963 merger of the locals, the rules governing the filling of vacancies in the full-time positions continued to exclude or disadvantage the black workers who had been discriminatorily assigned to seasonal positions. When management requests a job transfer of a regular employee that employee does not lose seniority rights, but when management requests a

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4/ See defendant American Brand's answers to Interrogatories #20-56 in Joint Appendix below.

seasonal employee to transfer to full-time work that employee loses his seniority rights.

Moreover, when a regular worker transfers from one full-time job to another one the employee retains all of his seniority rights, but when a seasonal worker transfers to a full-time job he loses all of his seniority rights.[5/] Furthermore, a seasonal worker who transfers to a full-time position almost always must enter at a bottom-level position because the regular workers have the first opportunity to move to the vacancies in full-time positions.

Accordingly, if a seasonal worker is employed in a seasonal position above the entry-level, he frequently will be required to suffer a short-term pay cut in order to move into a full-time position. The imposition of these penalties, the loss of seniority and the possible reduction in short-term pay, serve to lock in the effects of the historical

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5/ The transferring seasonal worker loses not only his "competitive" seniority rights, e.g., rights for job security and promotion, but also his "benefit" seniority rights, e.g., right for sick leave and vacation, except for retirement benefits. Cf. Franks v. Bowman Transportation Co., 424 U.S. 747, 765 (1976).

discriminatory practices which existed at the Richmond Leaf Division. These practices were responsible, as of February 13, 1976 for creation of a situation in which only one of the 16 positions of watchman was held by a black employee.[6/]

The historical practices of discrimination have continued to limit the employment opportunities of black workers for supervisory as well as hourly jobs. Almost invarably the Company selects its supervisory employees from its full-time staff. The Company has never promoted a seasonal worker directly to a supervisory position. The continuation of the effects of the past segregative practices has resulted in the selection of a disproportionately small group of the Company's black employees as supervisors. As of April, 1976, only 20% of these positions were filled by blacks.[7/]

6/ See defendant American Brand's answer to Interrogatory #15(c) continued in Joint Appendix below.

7/ Id. Interrogatory #65.

Proposed Consent Decree. Discovery conducted by the parties following the commencement of this lawsuit showed dramatically the degree to which particular job classifications could be identified by race. It also showed the extent to which seniority rules and transfer rules impinged on the capacity of defendants to eradicate the vestiges of past racial discrimination. The parties, of course, had differing views on the extent to which such lingering effects exist. To resolve their disagreement and to settle the controversy, the parties negotiated a proposed consent decree settling all claims outstanding between them and presented it to the district court, in accordance with Rule 23(e) of the Federal Rules of Civil Procedure.

One of the principal features of the proposed consent decree[7/] was a seniority clause requiring

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7/ Part III of the proposed consent decree stated the following:

" III. INJUNCTIVE RELIEF FOR THE CLASS

In full and final settlement of any and all claims for injunctive relief alleged in the Complaint, the parties agree to the following:

1. For the purposes of determining eligibility for vacations and for promotions,

current and future employees to be credited with actual time worked at the plant as seasonal employees. Another feature of the proposed

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7/ (contd.)
lay-offs and recalls, every current and future regular hourly paid production employee of the Richmond Leaf Department will be credited with actual time worked as a seasonal employee commencing with the date of hire of the last period of continuing employment as a seasonal employee in accordance with Section 1 of Article 7 of the current collective bargaining agreement governing seasonal employees. The combined total of such seasonal and regular employment will apply toward service requirements for vacations, and for promotions, demotions, lay-offs and recalls.

2. Regular employees who have served the probationary period as a seasonal employee during the last period of his or her continuous seasonal employment at Leaf prior to being transferred to regular Lear employment will become eligible for medical benefits and sick benefits immediately upon such transfer to regular employment.

consent decree allowed seasonal employees to transfer to permanent job positions as vacancies occurred provided, of course, no regular employees

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7/ (contd.)

3. In the event that vacancies in hourly paid permanent production job classifications at the Richmond Leaf Department are not filled by regular production employees, then all qualified hourly paid seasonal production employees will be given the opportunity to fill such vacancies prior to hiring from the outside.

4. In the event that vacancies in the job classification, Watchman, at the Richmond Leaf Department are not filled by regular production employees, then all qualified hourly paid seasonal production will be given the opportunity to fill such vacancies prior to hiring from the outside.

5. The Richmond Leaf Department adopts a goal of filling the production supervisory positions of Foreman and Assistant Foreman with qualified blacks until the percentage of blacks in such positions equals 1/3 of the total of such positions. The date of December 31, 1980 is hereby established for the accomplishment of this goal.

See Joint Appendix at 27a-28a.

desired the positions.

These provisions were patterned after the relief fashioned for seasonal workers in Russell v. American Tobacco Company, supra, 528 F.2d 357, 362-64 (4th Cir. 1975), cert. denied, 425 U.S. 935 (1976). Under the first above-mentioned feature of the proposed consent decree, seasonal workers are allowed to maintain their seniority upon transfer to regular positions. Under the second feature, seasonal employees are permitted to bid on vacancies in classifications, such as watchmen, which were once reserved for whites.

In addition, the proposed consent decree contained, in Part III, section 5, an affirmative action provision to reduce a historical underrepresentation of blacks which had existed in the supervisory positions. This provision provided that:

> The Richmond Leaf Department adopts a goal of filling the production supervisory positions of Foreman and Assistant Foreman with qualified blacks until the percentage of blacks in such positions equals 1/3 of the total of such positions. The date of December 31, 1980 is hereby established for the accomplishment of this goal.
> Joint Appendix at 31a.

Furthermore, the consent decree eliminated the requirement that seasonal workers must serve a

probationary period when they transfer to a full-time position. Finally, the decree contained a general injunction prohibiting the defendants from discriminating against black workers and a reporting provision requiring the Company to submit for a three-year period specific reports detailing compliance with the Decree. Joint Appendix at 31a.

All of the parties found that these provisions represented, in light of the history of the Richmond Leaf Department, a settlement that was reasonable, just, and fair to all concerned[8/]. Despite their agreement, the district court, by order filed June 2, 1977, denied the joint motion of the parties to approve and enter the proposed consent decree.

Several reasons were offered by the district court in support of its refusal to grant the motion. First, the district court judge stated that Title VII of the Civil Rights Act and the due process clause of the Fifth Amendment to the

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8/ See the Memorandum in Support of Entry of Proposed Consent Decree filed by defendant American Brands, Inc. in the district court. Also, see Memorandum in Support of Entry of Proposed Consent Decree filed in the district court by the two union defendants on April 15, 1977.

Constitution prohibited the defendant employer, defendant, unions, and the district court from granting preferential treatment to employees based upon race except upon a showing of past or present discrimination committed by the defendants.

Second, the district court said that the proposed consent decree was fatally flawed in seeking to provide for preferential treatment for black employees who were not shown to be victims of discrimination. Moreover, because the introductory section of the proposed consent decree contained a provision in which defendants denied that their actions had been discriminatory or unlawful, and contained another provision in which plaintiffs stated that they did not admit that defendants' actions were lawful, the district court concluded that there was not "create(d) any factual basis upon which relief may be granted." 446 F.Supp. at 788-789.

The district court conceded, however, that prior to September 1963, the "regular job classifications of truck driver, watchman, maintenance, storage, and boiler operator ... were reserved for whites only", 446 F.Supp. at 782, and that, as of April 5, 1976, only 20% of the 35 supervisory positions were filled with black employees. Id. at 783.

Petitioners appealed the district court's order to the Fourth Circuit. That court dismissed the appeal on the ground that the order was non-appealable under 28 U.S.C. §§1291 and 1292 (a)(1).

In holding that the district court's judgment was not appealable as an interlocutory decree denying an injunction, the Court of Appeals said, "Here, injunctive relief was not finally denied; it was merely not granted at this stage of the proceedings." 600 F.2d at 423. It regarded the order as deciding only that the case should go to trial. Id. at 423.

Following the rationale of the Second Circuit in Seigal v. Merrick, 590 F.2d 35 (2d Cir. 1978), it held that disallowance of the interlocutory appeal would strengthen the power of the district courts to draw parties into presenting more favorable settlement proposals. The denial of one agreement, it said, did not necessarily prevent a more "sweetened" agreement from being approved. 606 F.2d at 423-24. The court was oblivious to whether the order decided the merits of the action. It stated that "whatever the district court's reasons for refusing a decree, appeals of rights from those refusals would encourage an endless string of appeals and destroy the district court's supervision of the action as contemplated by Fed.R.Civ.Proc. 23(e)". Id. at 424.

The Fourth Circuit recognized that its decision was contrary to the decision in Norman v. McKee, 431 F.2d 769 (9th Cir. 1970), cert. denied, ISI v. Meyers, 401 U.S. 912 (1971), where the Ninth Circuit had held that orders disapproving proposed settlements of stockholder's derivative suits are appealable as collateral orders.[9/] However, it merely noted the existence of the case and did

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9/ Although the opinion in the Fourth Circuit below implied that petitioners only sought an interlocutory appeal under 28 U.S.C. §1292(a)(1), 606 F.2d at 421, petitioners, in fact, appealed the decision under both §1291 and §1292(a)(1). To help clarify the matter, the facts concerning the appeal are stated herein.

By letter to the Clerk of the Fourth Circuit Court of Appeals dated January 13, 1978, petitioners stated that the district court's order below was appealable under 28 U.S.C. §1291. Subsequently, however, petitioners filed, on February 9, 1979 a supplemental memorandum in which they stated, on page 2, that the case did not involve the collateral order doctrine of Cohen v. Beneficial Industrial Corp., 377 U.S. 541 (1949).

On February 20, 1979, petitioners filed a Supplemental Reply Memorandum in which they noted the existence of a conflict between the circuits on the issue of appealability under §1291 of a district court's order disapproving a proposed settlement of a derivative action. Because the proposed decree contained a request for an injunction, petitioners stated that jurisdiction could be upheld under §1292(a)(1) without reaching

not state why the court's analysis there was not persuasive.

SUMMARY OF ARGUMENT

A. Appealability Under §1291

Petitioners contend that the order of the district court denying approval to the parties' jointly proposed consent decree was appealable as a collateral order. Separate and apart from the issue of whether defendants have practiced racial discrimination against plaintiffs, this Court has established that a private employer and union can voluntarily establish an affirmative action plan on behalf of black employees in an industry in which there is an imbalance of black employees with respect to white employees arising out of a

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9/ (contd.)
the issue under §1291. They cautioned, however, that the court would be confronted with deciding the appealability of the order as a collateral order under §1291 if the court could not sustain jurisdiction under §1292(a)(1). See petitioners' Reply to Brief in Opposition to Certiorari, n.4.

Although petitioners subsequently emphasized the appealability of the district court's order under §1292(a)(1) in their Supplemental Brief for the Appellants On Consideration En Banc, they did not, at any time, waive or drop their insistence that the order was appealable as a collateral order under §1291.

historical exclusion of blacks. See United Steelworkers of America, AFL-CIO-CLC v. Weber, 443 U.S. 193 (1979). The denial of the right to settle voluntarily the instant action in accordance with principles set forth in Weber, supra, is therefore a collateral order affecting rights collateral to the merits of the action and thus was appealable under §1291.

B Appealability Under §1292(a)(1)

Petitioners contend that an examination of the grounds stated by the district court in support of its order denying approval to entry of a consent decree granting a permanent injunction, discloses that the order resolved the merits of the injunctive claims and of the Title VII claims. Since these grounds precluded the filing of a subsequent motion by petitioners for a preliminary injunction, the district court's order was appealable under §1292(a)(1) as an interlocutory order refusing an injunction.

ARGUMENT

I

INTRODUCTION

This case concerns the appealability of a district court's order which, on the basis of the

Fifth Circuit's opinion in Weber v. United Steelworkers of America, AFL-CIO, 563 F.2d 216 (5th Cir. 1977), subsequently reversed by this Court in United Steelworkers of America, AFL-CIO-CLC v. Weber, 443 U.S. 193 (1979), refused to approve, pursuant to Rule 23 of the Fed. R. Civ. P., a joint motion by the parties to enter a proposed consent decree granting permanent injunction

Petitioners contend that the order of the district court is appealable, pursuant to the collateral order doctrine, see Cohen v. Beneficial Industrial Loan Corp., 377 U.S. 541 (1949), as an exception to the finality requirement of 28 U.S.C. §1291. Petitioners also submit that the order is appealable under 28 U.S.C. §1292(a)(1) as an interlocutory order denying injunctive relief. The appealability of a district court's order which refuses to enter a jointly proposed consent decree settling the action and granting a permanent injunction, is a case of first impression in this Court.

The interlocutory order of the district court denied approval, under Rule 23(e), of the parties' jointly proposed consent decree and thereby denied their joint request for a permanent injunction. The appealability of orders of the district

courts refusing to approve proposed consent decrees has not been previously determined by the Court. Furthermore, the Court has not, in general, determined when interlocutory orders denying permanent injunctions are appealable under §1292 (a)(1). Compare, e.g., Smith v. Vulcan Iron Works, 165 U.S. 518 (1897) with Switzerland Cheese Asso-tion, Inc. v. E. Horne's Market, Inc., 385 U.S. 23, 23-25 (1966).

This case seemingly presents an opportunity for the Court to resolve both issues. Petitioners submit, however, that there are special factors operative here, such as the Congressional preference for voluntary settlement of Title VII actions, see Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974), and the peculiar nature of the grounds assigned by the district court in support of its order, which will permit the Court to decide this case without determining, in general, the appealability of orders denying proposed settlement decrees or the appealability of orders denying permanent injunctive relief. However, these special circumstances do warrant allowance of an appeal from the order below under both §1291 and §1292(a)(1).

II

THE DISTRICT COURT ORDER REFUSING TO APPROVE THE PARTIES' JOINTLY PRESENTED CONSENT ORDER WAS A COLLATERAL ORDER WHICH WAS APPEALABLE AS AN EXCEPTION TO THE FINAL JUDGMENT REQUIREMENT OF 28 U.S.C. §1291.

A. General

Section 1291 of Title 28 of the United States Code authorizes an appeal to a federal court of appeals of a final "decision" or judgment, of a federal district court. This Court, however, has, in interpreting the statute to effectuate its purposes, made exceptions to the "final judgment" rule. One such exception is the collateral order doctrine under which the Court has allowed the appeal of an interlocutory orders which is collateral to the merits of the underlying action. See Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949).

This doctrine, petitioners contend, is applicable to an order of the district court which, in a Title VII action, denied, under Rule 23 of the Fed. R. Civ. P., approval of a proposed consent decree, on the ground that the decree provided preferential treatment on the basis of race to black employees who were not victims of racially discriminatory actions by defendants.

At the outset, petitioners stress the importance of the issue involved. Voluntary settlement of employment discrimination suits lies at the heart of the effort to enforce Title VII. This Court has emphasized that "(c)ooperation and voluntary compliance were selected as the preferred means for achieving" the goal of equal opportunity in employment. Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974). Judicial review in the courts of appeals of settlement decrees has been extremely instrumental in carrying out this purpose of the statute. See, e.g.,.United States v. City of Miami, ___ F.2d ___ (5th Cir.), 22 EPD ¶30,821, April 10, 1980; United States v. City of Alexandria, ___ F.2d ___ (5th Cir.), 22 EPD ¶30,828, April 10, 1980.

Conversely, disallowance of interlocutory review of orders disapproving proposed settlement decrees is likely to frustrate the achievement of the purposes of Title VII. Not only would it put all voluntary settlements of Title VII actions at the mercy of district judges but it would also force the parties needlessly to undergo expensive, time-consuming trials.

B. The Applicable Law

With the exception of 28 U.S.C. §1292, and certain judicially created exceptions, the appealability of orders of the district court to the federal courts of appeals is limited by 28 U.S.C. §1291 to "final decisions." See Cobbledick v. United States, 309 U.S. 323 (1940); Catlin v. United States, 370 U.S. 294 (1962). In its decision in Cobbledick v. United States, supra, the Court found that Congress, with the enactment of §1291, prohibited "piecemeal disposition on appeal of what for practical purposes is a single controversy ... (and) set itself against enfeebling judicial administration." Id. 309 U.S. at 324.

Moreover, the Court has noted that the purpose of the final judgment rule is to avoid "the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment." Cobbledick v. United States, supra, 309 U.S. at 324. Thus, the final judgment rule, which "has the support of considerations generally applicable to good judicial administration", Radio Station WOW, Inc. v. Johnson, 326 U.S. 120 (1945), is, in the final analysis, designed to enable courts and litigants

to avoid "the mischief of economic waste and of delayed justice." Id. 326 U.S. at 123. Also see Dickinson v. Petroleum Conversion Corp., 338 U.S. 507, 511.

Despite the laudable goals of §1291, the courts have discovered that there are occasions where a strict application of the final judgment rule will not effectuate the purposes of the statute and instead "would practically defeat the right of any review at all." Cobbledick v. United States, 309 U.S. at 324. In these cases, denial of the right to an immediate appellate review would cause irreparable injury to the party seeking review. This is the basic justification for the Court's adoption of the collateral order doctrine under which certain interlocutory orders can be immediately appealed despite the absence of a final judgment terminating the action.

The collateral order doctrine was articulated and applied in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949). There, the Court, in upholding an interlocutory appeal of an order denying a request by defendant for the posting of a bond by plaintiff, observed that the

> order of the District Court did not make any step toward final disposition of the merits of the case and will not be merged in final judgment. When that time comes, it will be too late effectively

> to review the present order, and the rights conferred by the statute if it is applicable, will have been lost, probably irreperably We conclude that the matters embraced in the decision appealed from are not of such an interlocutory nature as to affect, or to be affected by, decision of the merits of this case.

Id. at 546. Accordingly, it held the order appealable on the grounds that it:

> appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.

Id. at 546.

The Cohen rule requires that an order must have three basic characteristics before it can qualify as a collateral order. First, the order must adversely affect a right that is separate and independent from whatever rights are asserted in the action. Second, the order must constitute a final determination of those rights. Third, the order must be one whose review cannot be postponed until final judgment because delayed review will cause irreparable harm by causing the rights conferred to be irretrievably lost.

In applying these criteria to determine appealability, a court must adopt a "practical rather than a technical construction" of §1291.

Cohen v. Beneficial Industrial Loan Corp., supra, 337 U.S. at 546. Such an approach will necessitate an evaluation of the competing considerations of "the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other."[10/] Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 171 (1974), citing Dickinson v. Petroleum Conversion Corp., 338 U.S. 507, 511 (1950).

C. Application of the Cohen Criteria

This Court has defined a collateral issue as an issue which is "a separate and independent matter, anterior to the merits and not enmeshed in the factual and legal issues comprising plaintiff's cause of action." Mercantile National Bank at Dallas v. Langdeau, 371 U.S. 555, 558 (1963). The right to reach a lawful settlement of a Title VII employment discrimination case pursuant to the guidelines set forth by this Court in Weber, supra, is separate and anterior to the merits of the claims in the Title VII action.

10/ In Norman v. McKee, 431 F.2d 769 (9th Cir. 1970) cert. denied, 401 U.S. 912, the Ninth Circuit allowed an appeal from a district court's rejection of a settlement agreement. The court said that the settlement of a class action under Fed.R.Civ. P. 23 is appealable as a final decision

The issues in a Title VII action concern issues such as the following: (1) the existence of discriminatory employment practices by defendant; (2) victimization of plaintiff by defendant's discriminatory practices; and (3) the fashioning of remedies that are commensurate in scope with the defendant's violation of law. See, e.g., Teamsters v. United States, 431 U.S. 324 (1977).

By contrast, as this Court indicated in United Steelworkers of America, AFL-CIO-CLC v. Weber, supra, where it upheld the lawfulness of a race-conscious affirmative action plan reserving 50% of the openings in an in-plant craft training program for black employees, the relevant issues in determining the lawfulness of a private, voluntarily negotiated affirmative action plan are (1) the extent to which the plan operates to reduce or lessen, pre-existing patterns of racial segregation and hierarchy by opening employment opportunities to blacks in occupational areas which have been traditionally closed to

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10/ (contd.)
under 28 U.S.C. §1291, because the "inconvenience of piecemeal review of an order disapproving a settlement is outweighed by the danger of denying justice by delay." 431 F.2d at 774.

areas which have been traditionally closed to them; (2) the degree to which the plan unnecessarily trammels the interests of white and other workers or creates a bar to the advancement of their legitimate interests; (3) the temporary nature of the plan; (4) the extent to which the plan is intended to eliminate a manifest racial imbalance and not to maintain racial balance; and (5) the extent to which the signatories to the affirmative action agreement adopted the plan voluntarily. See United Steelworkers of America, AFL-CIO-CLC v. Weber, supra, 443 U.S. at 208.

Moreover, the Court in Weber, supra, explicitly noted that the lawfulness of a private, voluntary affirmative action plan is separate and apart from the issue of a violation of Title VII. It said

> "(S)ince the Kaiser-USWA plan was adopted voluntarily, we are not concerned with what Title VII requires or with what a court might order to remedy a past proved violation of the Act."

Id. 443 U.S. at 200. Thus, the issue of whether plaintiffs and defendants can voluntarily agree upon a bona fide affirmative action plan that grants racial preferences is anterior to and not enmeshed in the issues of a Title VII suit. Weber, supra, 443 U.S. at 200.

The Court's decision in Weber, supra, not only established that the issue of the validity of private affirmative action plans for blacks is separate and independent of legal issues arising in a Title VII action, but also affirmed that private employers and unions have a right under Title VII to enter voluntarily into such plans. Moreover, the Court, in Weber, supra, protected the exercise of this right against opposing claims of third parties, such as employees who prefer to see the plans abandoned. 443 U.S. at 200-209.

Of course, the right to institute an affirmative action plan, such as the one in Weber, only exists when the plan complies with the criteria set forth in Weber, supra, 443 U.S. at 208. As the Court noted in Weber, the adoption of race-conscious, affirmative action plans

> falls within the area of discretion left by Title VII to the private sector voluntarily to adopt affirmative action plans designed to eliminate conspicuous racial imbalance in traditionally segregated job categories.

443 U.S. 209.

It is undisputed, in the present action, that "regular job classifications of truck driver, watchman, maintenance, storage, and boiler operator ... were reserved for whites only" prior to

September 1963. 446 F.Supp. at 782. Similarly, it is undisputed that, prior to September 1963, there existed separate unions for black and white workers. Finally, it is undisputed that the jurisdiction of the union representing black employees was, prior to September 1963, restricted to seasonal employees and that the jurisdiction of the union representing white employees was, at that time, restricted to nonseasonal, regular job classifications.

Since the terms of the proposed consent decree were in all other respects in compliance with the criteria set forth in Weber, supra, petitioners had a right to settle the action as provided by the decision in Weber, supra. Either Rule 41(c) or Rule 68 of Fed.R.Civ.P, could have been utilized by the parties to facilitate settling their grievances without intervention of the courts.[11/]

11/ Fed. R. Civ. P., 41(a) provides that an action may be voluntarily dismissed by the plaintiff with the consent of all parties. Similarly, Rule 68 provides that

> "At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him ... to the effect specified in his offer. If within 10 days after the service of the

This Court has stated that courts should accord deference to the processes of voluntary conciliation and settlement. See, e.g., Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974). Similarly, the lower courts have sanctioned settlement efforts in civil rights actions. As the Fifth Circuit said in United States v. Allegheny-Ludlum Industries, Inc., 517 F.2d 826, 846 (5th Cir. 1975), citing Dent v. St. Louis-San Francisco Ry. Co., 406 F.2d 399, 402 (5th Cir. 1969),

> It is quite apparent that the basic philosopy of these statutory provisions is that voluntary compliance is preferable to court action and that efforts should be made to resolve these employment rights by concilation both before and after court action.

The existence of a right to settle a Title VII action in accordance with the standards set forth in Weber, supra, distinguishes this case from Coopers & Lybrand v. Livesay, 437 U.S. 463, 467 (1978) and Gardner v. Westinghouse Broadcasting

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11/ (contd.)
offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment."

Co., 437 U.S. 478 (1978). In Coopers & Lybrand and Gardner, this Court held that an order refusing certification of a class was not appealable as a collateral order or as an interlocutory order denying an injunction.

The plaintiffs there had no substantive right to have the action certified as a class action under Rule 23. Nor did denial of their claim for class certification affect any substantive rights of theirs. By contrast, petitioners here have a substantive right which is based upon the Court's decision in Weber, supra, and which is supported by Congressional policy promoting settlements of Title VII actions.

Although Federal Rule of Civil Procedure 23(e), to be sure, prevents parties from having an unencumbered right to settle class actions, Rule 23(e) does not negate the parties' legal right to settle the case in accordance with standards set forth in Weber, supra.

The policy behind Rule 23(e) stems from a need to protect the interests of those class members who are absent during settlement negotiations. The need to protect the absent class members, however is minimal in a case, such as here, where the only right of protection advanced in their behalf is one which this court rejected

in United Steelworkers v. Weber, supra. A district court cannot, under the guise of effectuating Rule 23(e), collaterally attack the holding and rationale of the Court's decision in Weber.

Insofar as the rights of third parties seeking protection under Rule 23(a) do not differ from those asserted by plaintiff Weber in United Steelworkers of America v. Weber, supra, Rule 23(a), as a matter of law, cannot be used to defeat the rights of private parties to institute an affirmative action plan which conforms to the requirements of the Court set forth in United Steelworkers of America v. Weber, supra. Such a rule of law is a necessary requirement if the proposed consent order is one which, like here, does not require the discharge of white workers, does not unnecessarily trammel upon the interest of white employees, is voluntarily adopted, is designed to eliminate traditional patterns of racial segregation and hierarchy, is temporary, is created to eliminate a manifest racial balance and not to maintain a racial balance, and does not require a percentage of black employees greater than that of blacks in the relevant labor force.

Petitioners' rights under Weber, supra, were thus denied as a result of the district court's rejection of the proposed decree on the basis of

the inclusion of an affirmative action plan within the decree. By rejecting the decree, the district Court therefore made a final determination of the parties' collateral right to settle the action in accordance with the decision in Weber.

This aspect of the case distinguishes it from Seigal v. Merrick, 590 F.2d 35 (2d Cir. 1978), which was relied upon by the Court of Appeals below. In Seigal, the Second Circuit held that a district court's disapproval of a settlement agreement in a stockholder's derivative action was not appealable as a collateral order.

Objections were raised in Siegal v. Merrick, supra, to the proposed settlement because of disagreements concerning the date on which the value of an option was measured and concerning the criteria by which the value of the option should be measured. These objections, however, were not, as here, contrary to legal principles enunciated by this Court. Rather, they were based upon concepts of fairness and equity which had not previously been definitively resolved by this Court. To this extent, therefore, the facts of Siegal v. Merrick, supra, are distinguishable from the facts of the present case.

The duty of the district court in Siegal v. Merrick, supra, was to determine, pursuant to Rule

23 whether the proposed settlement of the stockholder's derivative action was, in light of the objections made to it, fair and equitable. Although the district court below also had a duty to determine if the terms of the proposed consent decree were fair and equitable, it also had imposed upon it a duty to insure that its determination of what is fair and equitable was in accordance with the purposes of Title VII and with applicable legal principles determined by this Court. This Court's decision in Weber, supra, demonstrates that the district court below failed to satisfy this obligation.

These considerations show that the Second Circuit's decision in Siegal v. Merrick, supra, is inapplicable to the facts of this case. The opposing decision of the Ninth Circuit in Norman v. McKee, supra, in which the court held that orders refusing proposed settlements are appealable as collateral orders, states the better rule, especially in cases such as here where the basis for the order refusing the consent decree is based upon a violation of important, substantive interests which the Congress has sought to protect and maintain.

The second prong of the Cohen test requires that an order constitutes a final determination of

the collateral rights involved before an appeal under §1291 is allowed. The Court, however, has recognized that the determination of when a right has been finally decided and is thereby ripe for appeal under the collateral order doctrine, is not an exact science. In Dickinson v. Petroleum Conversion Corp., supra, 338 U.S. at 511, Mr. Justice Jackson emphasized that there was no set formula for determining the finality of a decree. The only reliable guide which the Court has found is the avoidance of any rigid insistence on technicality which conflicts with the purposes of §1291 and the collateral order doctrine. This approach requires a "practical" inquiry to determine if the nature and the effect of the district court's denial of the the settlement decree is such that review of the order cannot be postponed until the rendition of a final judgment in the action See Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 170 (1974); Gillespie v. U.S. Steel Corp., 379 U.S. 148, 152 (1964).

One factor which bears on the finality of a collateral order is whether the issue requiring review will become moot if the review is delayed. Thus, for instance, the district court's order in Gardner v. Westinghouse Co., 437 U.S. 478, (1978)

denying class certification, was held not appealable precisely because effective relief could be provided even after final judgment on the merits of the action, if the prior denial of relief was shown to be in error. Id. 437 U.S. at 480. On the other hand, in Eisen v. Carlisle & Jacquelin, supra, the Court permitted an appeal of a district court's order which imposed 90% of the cost of giving notice to class members in a securities fraud case upon the defendant. Disallowance of the appeal would have made moot the collateral claim since it was the order which permitted the plaintiffs' suit to proceed as a class action. Id. 417 U.S. at 172.

In the present case, the district court's order deprived the parties of their right to remedy the effects of prior segregated job practices by invoking their rights under Weber, supra, and Title VII to settle the action voluntarily.

The tenor of the district court's opinion below tended to indicate that a final determination had been made. The opinion stated that the Court would enter a consent decree only when "the parties have settled their differences without a violation of the law and without violating the

right of any class member. 446 F. Supp. at 791. At another portion of the opinion, the district court claimed that "Preferential treatment on the basis of race - any race - violates the Constitution." 446 F. Supp. at 788. It also said that "the Court perceives no such vestiges" of discrimination." 446 F. Supp. at 790.

These findings and conclusions would, if left standing, utterly doom any possibility of a settlement. The parties' willingness to settle their differences is dependent, at any time, upon the prospects for ultimate victory then as well as the probable costs in money, resources, and time, of seeking such a victory.

The district judge, by stating that he perceived no evidence of discrimination by the defendants, created an incentive for defendants to go to trial to win the case. Once trial, however, had begun, there would be no way in which the parties, despite whatever might be done upon review of a final judgment, could retrieve the advantages which a settlement would have brought.

Moreover, the advantages of a particular settlement which was probable at one time would be forever lost. See Norman v. McKee, supra. Thus, the district court's order finally determined petitioners' collateral rights.

The third prong of the Cohen test requires that the interlocutory order must have an "irreparable" effect. This refers to the nature and the extent of the injury, such as whether it is destructive, substantial, continuing or irremedial. See, e.g., Osborne v. Missouri P.R. Co., 147 U.S. 248, 258 (1893); Brown v. Chote, 411 U.S. 452, 456 (1973). Also, however, as the Court has noted, "inadequacy of available remedies goes . . . to the existence of irreparable injury." United States v. American Friends Service Committee, 419 U.S. 7, 11 (1974). For the reasons previously mentioned, however, with respect to why the district court's order in this case was a final determination of petitioners' collateral rights, the order caused petitioners' irreparable injury. It was therefore appealable, pursuant to §1291, as a collateral order.

III

THE DISTRICT COURT'S ORDER BELOW IS APPEALABLE UNDER 28 U.S.C. §1292(a)(1) AS AN INTERLOCUTORY ORDER DENYING AN INJUNCTION

The second issue raised in this case concerns the appealability, under 28 U.S.C. §1292(a)(1), of a district court's order which denied, as a matter of law, a joint motion by the parties to settle the action in accordance with the terms of a proposed consent decree which granted a permanent injunction.

A. The Applicable Law

Section 1292(a)(1) of Title 28 of the United States Code provides for the appeal of certain interlocutory orders of the district courts.[12/]

12/ The appeal of interlocutory orders of federal district courts to the courts of appeals was first provided as a result of the enactment of the Evarts Act of 1891, 26 Stat. 826. As originally enacted, the Evarts Act authorized an interlocutory appeal only "where . . . an injunction shall be granted or continued." In a subsequent amendment to the Act in 1895, the jurisdiction of the court of appeals was extended to encompass appeals from orders of district courts refusing requests for injunctions. 28 Stat. 666. For a review of the history of interlocutory appeals in the federal curts, see Stewart-Warner Corp. v. Westinghouse Elec. Corp., 325 F.2d 822, 829-230 (2d Cir. 1963) (Friendly, J., dissenting), certiorari denied, 376 U.S. 11.

The statute grants jurisdiction to the United States Courts of Appeals over appeals from:

> (i)nterlocutory orders of the district courts of the United States, or of the judges thereof, granting continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions except where a direct review may be had in the Supreme Court.

Since the enactment of 1292(a)(1), the courts have been plagued with problems concerning the statute's proper interpretation and application.[13/] The difficulties in interpreting and applying the statute have been compounded because of the fact that "(n)o discussion of the underlying reasons for

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13/ See, e.g., Enelow v. New York Life Ins. Co., 293 U.S. 379 (1935); Ettelson v. Metropolitan Life Ins. Co., 317 U.S. 188 (1942); Morgantown v. Royal Ins. Co., 337 U.S. 254 (1949); Switzerland Cheese Association, Inc. v. Horne's Market Inc., 385 U.S. 23 (1966). Generally, see Note, Appealability in the Federal Courts, 75 Harv. L. Rev. 351 (1952); Wright & Miller, Federal Practice and Procedure, §§3920, 3921-3924.

modifying the rule of finality appears in the legislative history" of §1292(a)(1).[14/] Baltimore Contractors v. Bodinger, 348 U.S. 176, 181 (1955).

This Court has found that the purposes of §1292(a)(1) can best be achieved if the appealability of an order is determined in accordance with the nature and the effect of the order,[15/] see Gardner

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14/ Despite the lack of clear legislative history, it has been possible to conclude that the reasons for amending the statute spring from a developing need to permit litigants to effectually challenge interlocutory orders of serious, perhaps irreparable consequence. Baltimore Contractors v. Bodinger, supra, 348 U.S. at 181.

In Maxwell v. Enterprise Wall Paper Co., 131 F.2d 400, 402 (3rd Cir. 1942), the Third Circuit found, with respect to §1292(a)(1) that:

> The manifest purpose of the statute is to enable a litigant to seek prompt review in an appellate court from an order or decree which in most instances is effective upon its rendition and is drastic and far reaching in effect.

See also Morgenstern Chemical Co. v. Schering Corp., 181 F.2d 160 (3rd Cir. 1950).

15/ In Stewart-Warner Corp. v. Westinghouse Electric Corp., supra, the majority of the Court held that a dismissal of an intervenor's claims for injunctive relief alleged in a counterclaim

v. Westinghouse Broadcasting Co., supra, 437 U.S. at 480-481; Cohen v. Beneficial Industrial Loan Corp., supra, as measured by the impact it has upon the rights of the parties.

B. Criteria Governing The Application of §1292(a)(1)

1. General

In a series of decisions, the Court has narrowed the class of orders which are appealable under §1292(a)(1). The Court's decisions have allowed the appeal of an order pursuant to §1292 (a)(1) only when the order satisfied five basic criteria. First, the order must be interlocutory. See, Baltimore Contractors v. Bodinger, supra, 348 U.S. at 181; Switzerland Cheese Association v. E. Horne's Market, Inc., 385 U.S. 23 (1966). Second, the order must grant, deny, continue, modify or refuse to dissolve or modify, an injunction. See, 28 U.S.C. §1292(a)(1).

15/ (contd)
for patent infringement and unfair competition was appealable under 28 U.S.C. §1292(a)(1) even if the basis for dismissal rested upon a conclusion that the counterclaim improperly enlarged the action. Judge Friendly, dissenting, charged that the order was not appealable. As he saw it "(a)ppealability must turn on the nature of the order." 325 F.2d at 829.

Third, it must determine more than that the case should proceed to trial; see, Switzerland Cheese Association v. E. Horne's Market, Inc., supra, 385 U.S. at 25. Fourth, it must settle, or tentatively decide, an aspect of the merits of a party's claim for injunctive relief. See, Gardner v. Westinghouse Broadcasting Co., supra; 437 U.S. at 480-482. Fifth, it must cause a threat of serious, irreparable injury which can be alleviated only through allowance of an interlocutory appeal. Gardner v. Westinghouse Broadcasting Co., supra, 348 U.S. at 181.

2. Interlocutory Order

Interlocutory orders of a district court are orders rendered before final judgment which advance a case towards final judgment.[16/] See,

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16/ Although this Court implied in its decision in Switzerland Cheese Association, Inc. v. E. Horne's Market, Inc, supra, that interlocutory orders are orders which "touch on the merits of the claim," 385 U.S. at 25, subsequent decisions of the Court as well as general principles, seem to indicate that the interlocutory nature of an order is separate from the issue of whether the order touches on the merits of the claim. See, e.g., Gardner v. Westinghouse Broadcasting Co. Also see Wright & Miller, Federal Practice and Procedure, §3924, pp. 72-73 (1977).

e.g., Baltimore v. Bodinger, supra, 348 U.S. at 183-184. Such interlocutory orders however, do not become appealable under the statute merely because they are "important, and may determine the outcome of the litigation." Morgantown v. Royal Ins. Corp.,. 337 U.S. 254, 258 (1949).

3. Injunctive Relief

Although §1292(a)(1) is applicable only to orders involving injunctive relief, see Wright & Miller, Federal Practice and Procedure, §3922 (1977), this Court has not determined what constitutes an injunction for the purposes of §1292 (a)(1). See, e.g., Baltimore Contractors v. Bodinger, supra, where the issue was "(w)hether in an action for accounting an interlocutory order denying a stay under Section 3 of the United States Arbitration Act should be regarded as a denial of an injunction from which an appeal lies." 348 U.S. at 177. See also, Shanferoke Coal & Supply Corp. v. Westchester Service Corp., 293 U.S. 449 (1935).

The Court has held, to be sure, that denials of requests for preliminary injunctions are covered by the statute. Baltimore Contractors v. Bodinger, supra, 348 U.S. at 182. See also,

George v. Victor Talking Machine Co., 293 U.S. 377 (1934). Uncertainty, however, exists over the extent to which §1292(a)(1) is applicable to requests for a permanent injunction.

For example, in Switzerland Cheese Association, Inc. v. E. Horne's Market, Inc., supra, where it was held that the denial of plaintiffs' motion for summary judgment granting a permanent injunction was not an appealable order under §1292 (a)(1)[17/], the Court said:

> It is earnestly argued, however, that although this order denied a permanent injunction, it was nonetheless "interlocutory" within the meaning of §1292 (a)(1) because the motion for summary judgment did service for a motion for a preliminary injunction ... and that therefore "interlocutory" must also include a denial of a permanent injunction.
>
> We take the other view not because "interlocutory" or preliminary may not at times embrace denials of permanent injunctions, but for the reason that the denial of a motion for summary judgment because of unresolved issues of fact

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17/ In dealing with the somewhat analogous provisions of 28 U.S.C. §1253, providing that:

> Except as otherwise provided by law, any party may appeal to the Supreme Court

> does not settle or even tentatively decide anything about the merits of the claim.

385 U.S. at 24-25. Thus, requests for permanent injunctions are not per se beyond the scope of application of §1292(a)(1).

Indeed, no such per se exclusion could be justified under the statute for the simple reason that an "(a)ppeal under §1292(a)(1) depends on the

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17/ (contd)

> from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges,

this Court concluded that "the only interlocutory orders that we have power to review under that provision are orders granting or denying preliminary injunctions". Goldstein v. Cox, 396 U.S. 471 (1970).

The Court acknowledged, in Goldstein v. Cox, supra, that "(o)n its face, this language is subject to the construction that interlocutory orders denying permanent as well as preliminary injunctions can be appealed to this Court." 396 U.S. at 477. However, it nonetheless "conclude(d) that our jurisdiction over interlocutory orders under §1253 is confined to orders granting or denying a preliminary injunction." Id. at 478.

interlocutory nature of the order involved, rather than the interlocutory nature of the injunctive relief requested." Wright & Miller, Federal Practice and Procedures, supra, §§3924, p. 67.

Thus appeals under §1292(a)(1) can be made from interlocutory orders granting a permanent injunction. See W.L. Gore & Associates, Inc. v. Carlisle Corp., 529 F.2d 614 (3rd Cir. 1976). Indeed, this Court, in Smith v. Vulcan Iron Works, 165 U.S. 518 (1897), permitted an appeal from an

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17/ (contd)
Despite the facile similarity between §1253 and §1292(a)(1) there are important differences between them. First, §1253 explicitly refers to permanent injunctions. Moreover, it explicitly mentions both permanent injunctions and interlocutory injunctions, thereby drawing a distinction between them. Second, §1253 expressly refers to interlocutory injunctions whereas §1292(a)(1) refers to interlocutory orders granting, continuing, modifying, refusing, or dissolving injunctions. Thus §1292(a)(1) is broader with respect to interlocutory orders. Moreover, it does not exclude interlocutory orders refusing permanent injunctions whereas §1253 does not include interlocutory orders refusing permanent injunctions. Thus, the decision in Goldstein v. Cox is inapplicable to the instant case.

interlocutory order granting a permanent injunction against patent infringement.

The issue in Smith v. Vulcan Iron Works, supra, one of the early cases construing and applying the Evarts Act, arose as follows: The district court rendered an order which permanently enjoined defendant from infringing the plaintiff's patent. Final judgment, however, was reserved pending the outcome of the district court's reference of the case to a master for an accounting. Defendant filed an appeal from the order granting the permanent injunction. This Court allowed the appeal.

The opinion of the Court reviewed the history of appeals of interlocutory orders granting injunctions in the English Court of Chancery, the House of Lords, and in the United States. It stated:

> But under the judicial system of the United States, from the beginning until the passage of the Act of 1891, establishing circuit courts of appeals, appeals from the circuit courts of the United States in equity or in admiralty, like writs of errors at common law, would lie only after final judgment or decree; and an order or decree in a patent cause, whether upon preliminary

> application or upon final hearing, granting an injunction and referring the cause to a master for an account of profits and damages, was interlocutory only, and not final, and therefore not reviewable on appeal before the final decree in the cause.

165 U.S. at 524. It concluded, however, that the American policy with respect to finality had been altered by the passage of the Evarts Act of 1891.

In particular, the court observed that §7 of the Evarts Act had, at that time, explicity provided that "where upon a hearing in equity ... an injunction shall be granted or continued by an interlocutory order or decree ... an appeal may be taken from such interlocutory order or decree granting or continuing such injunction." Id. at 524. Thus, the Court concluded that the Evarts Act contemplated the use of interlocutory orders to grant permanent injunctive relief. Accordingly, it allowed the appeal of an interlocutory order granting a permanent injunction.

The 1895 amendment to the Evarts Act provided for an appeal of a denial of an injunction in all cases in which an appeal would be permitted for the granting of an injunction. Thus, in some instances, it is possible, under the holding in

Smith v. Vulcan Iron Works, supra, to appeal an interlocutory order granting a permanent injunction. Whether the appeal will be allowed depends, of course, upon the extent to which the order is interlocutory and operates, in practice, to preclude the granting of injunctive relief.

4. Characteristics of An Injunction

a. More Than a Mere Pre-trial Order

In order to constitute an order granting or denying injunctive relief, an interlocutory order must, under §1292(a)(1), be more than a "pretrial order that decides only one thing -- that the case should go to trial", Switzerland Cheese Association v. E. Horne's Market, supra, 385 U.S. at 25, or an order which is only "a step in controlling the litigation before the trial court." Baltimore Contractors v. Bodinger, supra, 348 U.S. at 185. If these conditions, are not met, then it is unlikely that there will be a need for critical examination and re-examination of the issue by the cumbersome method of appeal prior to final adjudication of the action. See, Peter Pan Fabrics, Inc. v. Dixon Textile Corp., 280 F.2d 805 (2d Cir. 1960)(Judge Clark, dissenting).

b. Determining the merits

Orders addressed to a party which "touch on the merits of the claim" of the party, are less likely, under §1292(a)(1), to be deemed mere pre-trial orders. Switzerland Cheese Association v. E. Horne's Market, supra, 385 U.S. at 25. In general, it can be presumed that interlocutory orders which "affect the merits of petitioner's own claim," Gardner v. Westinghouse Broadcasting Co., supra, 437 U.S. at 480-481 or which have a "direct or irreparable impact on the merits of the controversy", Id. at 482, will fall under §1292(a)(1), especially if they also "pass on the legal sufficiency of any claims for injunctive relief." Id. at 481.

Thus, a major factor effecting appealability under §1292(a)(1) is the extent to which the order being appealed has the effect of determining the legal sufficiency of a claim for injunctive relief. Put another way, the critical issue becomes whether the order denies appellant "the protection of the injunction prayed." General Electric Co. v. Marvel Rare Metals Co., 287 U.S. 430, 433 (1932).

Many interlocutory orders involving a permanent injunction will not meet this criteria. For example, an order denying a motion for summary judgment to grant a permanent injunction will not generally satisfy the criteria, see, e.g., Switzerland Cheese Association v. E. Horne's Market, Inc., supra, since it will not in general, preclude the filing of a subsequent motion for a preliminary injunction.[18/] See, Chappell & Co. v.

18/ The earliest rationale for disallowing an appeal of an order denying a motion for summary judgment granting an injunction was set forth by Judge Hastie in Morgenstern Chemical Co. Inc. v. Schering Corp., 181 F.2d 160 (3rd Cir. 1950).

The action there was brought by plaintiff to enjoin defendant's continued use of a trade-mark. The district court denied plaintiff's motion for a summary judgment granting a permanent injunction. Plaintiff appealed from the interlocutory order. In rejecting the appeal, Judge Hastie stated that

> ... so far as we have been able to determine, appeals from refusals of injunctions have been in cases where the merits of the applications for injunctive relief had been passed upon in the trial courts ....

Frankel, supra, 367 F.2d 197, 203 (2d. Cir. 1966).

To the extent that an order denying a motion for summary judgment is only a denial of a request for acceleration of the trial process and is not a rejection of the legal sufficiency of the injunctive claim, then the order is not a refusal of an injunction and it is consequently not appealable under §1292 (a)(1).

18/ (contd.)

> The denial of summary judgment in the court below has no comparable significance. The court has not reached, much less decided, the merits of plaintiff's claim for injunction .... Nothing has occurred in or as a result of the denial of the motion which precludes plaintiff from seeking a temporary injunction in accordance with established procedure if he believes immediate injunctive relief is necessary and proper. Plaintiff is merely relegated to the normal procedure of trial which would have been the only procedure before the adoption of Rule 56 .... In character and impact the court's action was not greatly different from an order continuing a cause already calendered for trial until some future date in order that additional witnesses may be called.

181 F.2d at 162.

This analysis is consistent with the decision of the Court in Switzerland Cheese Association, Inc. v. E. Horne's Market, Inc., supra, since the denial there of the motion for summary judgment granting a permanent injunction was based upon the ground that there existed genuine issues of facts which were in dispute. Thus, the denial of the motion was a rejection of a request for acceleration of the adjudicatory process. It did not decide anything about the merits of the claim for injunctive relief. The question in every case, it seems, is the effect of the denial and the grounds for it. See, e.g., Safe Flight Instrument Corp. v. McDonnel-Douglas Corp., 482 F.2d 1086, 1093 (9th Cir. 1973), certiorari denied 414 U.S. 1113.

More specifically, the relevant distinction appears to be between an order whose purpose, or effect, is to deny injunctive relief and an order whose purpose, or effect, will not preclude a subsequent grant of similar injunctive relief[19/]

19/ This is perhaps the distinction which this Court sought to invoke in Gardner v. Westinghouse Broadcasting Co., supra, 437 U.S. at 481, n.7, when it quoted from Judge Friendly's dissenting

The grounds given in support of the order can, in part, thus be used to determine if the order effectively bars, as a practical matter, a subsequent claim on the merits for similar injunctive

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19/ (contd.)
opinion in Stewart-Warner Corp. v. Westinghouse Electric Corp., 325 F.2d 822, 829 (2d Cir. 1963). Judge Friendly, in opposing the court's allowance of an appeal from an order which had dismissed intervenor's counterclaims for injunctive relief on the ground that they would unduly enlarge the scope of the action, stated that

> "Appealability must turn on the nature of the order ... The distinction ... was between a 'refusal' based on an allegedly erroneous conclusion that the law does not permit the claim for an injunction to be heard in the action ... and one based on alleged abuse of a discretionary power over the scope of the action. Where the order is of the former type, the danger of serious harm from the court's erroneous belief in the existence of a legal barrier to its entertaining a claim for an injunction has been thought to outweigh the general undesirability of interlocutory appeals. The very fact that the second type of order hinges on the trial court's discretion is itself an indication that such orders, relating primarily to convenience in litigation, carry a lesser threat of harm.

relief. If such relief is barred and the order also causes irreparable injury, then it is appealable under §1292(a)(1).

5. Irreparable Injury

In Sampson v. Murray, 416 U.S. 61 (1974) the Court recognized that "the possibility that adequate compensatory or other corrective relief will be available at a later date, ... weighs heavily against a claim of irreparable harm." 416 U.S. at 90, quoting Virginia Petroleum Jobbers Assn. v. FPC, 259 F.2d 921, 925 (D.C.Cir. 1958). The existence of irreparable injury under §1292(a)(1) may therefore be shown by demonstrating that there is no adequate remedy for the appellant's substantial injury other than by allowing an interlocutory appeal.

C. Application of the Criteria Under §1292(a)(1)

Unquestionably, the order of the district court below denying approval of the proposed consent decree granting a permanent injunction was an interlocutory order denying an injunction within the meaning of §1292(a)(1). The proposed decree

included an express request for a permanent injunction enjoining defendants from discriminating against petitioners and class members, and enjoining them to take certain affirmative steps to correct the effects of the discrimination.[20/]

20/ These steps included the following:

> (1) instituting new rules and procedures, as set forth in the proposed decree, for determining seniority, or eligibility, for vacations, promotions, demotions, lay-offs, and recalls;
>
> (2) providing medical and sick benefits, upon transfer to regular employment, to certain employees who served their probationary period as a seasonal employee;
>
> (3) providing, under certain circumstances, a preference for hourly paid seasonal production employees to fill vacancies arising in the hourly paid permanent production job classification;
>
> (4) granting hourly paid seasonal production employees a preference for filling vacancies in the job classification of Watchman; and
>
> (5) filling by December 31, 1980, the production supervisory positions of foreman and assistant foreman with qualified blacks until the percentage of blacks in the position equals one-third of the total.

Joint Appendix at 27a-28a.

The order of the district court satisfies the specific requirement under §1292(a)(1) that the order must touch on the merits of petitioners' claim. In fact, the grounds assigned by the district court in support of its order clearly indicate that it determined simultaneously the sufficiency of the injunctive claim and the merits of the action.

For example, the district court, in its opinion, specifically held that "racial preferences are forbidden in this nation." 446 F.Supp. at 770. This holding undermined the claim for injunctive relief. In another portion of the opinion, the district court concluded that the "proposed consent decree herein, rather than aiding victims of violations of the law, would itself violate the law and victimize innocent people both black and white." Id. This conclusion also undermined the injunctive claim.

The district court also critized the proposed consent decree on the ground that "there was no apparent consideration given to whether or not the preferred employees have been, are, or would be subject to racial discrimination. 446 F.Supp. at 789. This assessment undermined both the claim

under Title VII and the claim for injunctive relief. Similarly, the court's finding that the beneficial aspects of the decree were not limited to "victims of racial discrimination", Id. at 789, and the finding that there were no vestiges of discrimination upon which the proposed decree could be supported as a measure to overcome the effects of discrimination, Id. at 790, tended to erode the basis for any recovery by petitioners on their Title VII claims.

The grounds assigned by the district court in rejection of the proposed settlement decree thus determined the merits of the injunctive claims and the merits of the action. As a matter of law, these claims were found to be legally insufficient. Moreover, the alleged legal insufficiency of the claims was the sole basis for rejection of the proposed settlement decree.

Necessarily, the the grounds specified by the district court for rejection of the decree precluded a subsequent motion by petitioners for a preliminary injunction granting all, or part, of the relief specified in the proposed consent decree. To obtain a preliminary injunction, the petitioners are required to demonstrate the existence of a substantial likelihood that they

will ultimately prevail on the merits. See Sampson v. Murray, 416 U.S. 61 (1974).

Given the findings and conclusions of the district court, however, it is clear that petitioners could not have made such a showing, with respect to any of the relief specified in the proposed decree, to the satisfaction of the district court, and therefore could not have obtained a preliminary injunction. See Chappel & Co. v. Frankel, supra, 367 F.2d at 203. Also see Morgenstern Chemical Co. v. Schering Corp., supra, 181 F.2d at 162. Thus, the nature and the effect of the district court's interlocutory decree was to deny petitioners "the protection of the injunction prayed". General Electric Co. v. Marvel Rare Metals Co., supra, 287 U.S. at 433.

The district court's findings and conclusions on the merits of the request for a final injunction also necessarily determined the merits of petitioners' Title VII action. For petitioners to prevail on their Title VII claims, they were required to show that defendants had committed discriminatory actions in violation of Title VII, that petitioners were victims of the discrimination, and that the scope of the relief requested

was commensurate with the scope of the injury which defendants had caused through their discriminatory practices. See Teamsters v. United States, 431 U.S. 324 (1977). The district court, however, decided against petitioners on each of these three issues, 446 F. Supp. at 788-791, thereby foreshadowing ultimate defeat, on the merits, of petitioners' Title VII claims.

In short, the effect of the interlocutory order below was to "pass on the legal sufficiency of . . . (the) claims for injunctive relief", Gardner v. Westinghouse Broadcasting Co., supra, 437 U.S. at 481, and thereby to settle, or tentatively decide, the petitioners' claims on the merits. See Switzerland Cheese Association v. E. Horne's Market, supra, 385 U.S. at 24. It therefore satisfied the essential prerequisite for appealability under §1292(a)(1).21/

21/ It should, perhaps, be noted that petitioners' argument that the district court's order below is simultaneously appealable as a collateral order and as an order refusing an injunction does not involve an inconsistency. Although the appealability of a collateral order is premised

This analysis shows that the court of appeals below had no basis, in fact or law, for holding that "(h)ere, injunctive relief was not finally denied; it was merely not granted at this stage in the proceedings". 606 F.2d at 423.

21/ Cont.

upon a showing that the order finally determines rights which are separate and independent of the merits, and the appealablity of an order refusing an injunction is based upon a demonstration that the order touches on or resolves the merits, the two apparently inconsistent positions are easily reconcilable.

With respect to the appealability of the order below as a collateral order, the right affected is the parties' right to settle the case, prior to trial, in accordance with standards set forth in Weber, supra. This right is, of course, separate and independent of the right sued upon pursuant to Title VII.

On the other hand, the right affected with respect to the refusal of an injunction concerns petitioners' right under Title VII as well as the parties' right to institute an affimative action plan. The former, of course, is exactly the right sued upon and therefore an order adversely affecting it touches on the merits of the action.

Thus, the two positions are consistent with one another since they involve different rights.

In making this holding, the Fourth Circuit assumed that the facts here were analogous to those in Liberty Mutual Insurance Co. V. Wetzel, 424 U.S. 737 (1976); Switzerland Cheese Association, Inc. v. E. Horne's Market, Inc., supra; and Gardner v. Westinghouse Broadcasting Co., supra. These cases, however, are inapposite.

In Liberty Mutual Insurance Co. v.Wetzel, supra, where the issue was the appealability of an interlocutory order determining liability but reserving decision on the nature and extent of the relief to be granted, this Court held §1292 (a)(1) inapplicable because "there was no denial of any injunction sought by petitioner". 424 U.S. at 745. By contrast, the petitioners in this action sought an injunction which was denied on the merits.

The decision in Switzerland Cheese Association, Inc. v. E. Horne's Market, Inc., supra, is clearly distinguishable from the present case since the existence there of facts in dispute rendered premature any determination on the merits of the injunctive claim. Moreover, the decision there, unlike the one here, did not preclude the filing of a subsequent motion for a preliminary injunction.

In Gardner v. Westinghouse Broadcasting Co., supra, the issue was the appealability of a denial of class certification. As the court pointed out there, the order neither denied injunctive relief nor determined the merits of actions. It simply determined the range of persons who could benefit from the judgment or who would be bound by it. Also, it did not preclude an attempt by any party to file a request for a preliminary injunction. Here, however, an injunction was denied on the grounds of its legal sufficiency. Those grounds were sufficient to bar, on the merits, any later effort to request a preliminary injunction. None of these cases therefore supported the holding below of the court of appeals.

In addition to its purported reliance upon the decisions of this Court, the court of appeals found the facts of the present case to be analogous to the facts in Seigal v. Merrick, 590 F.2d 35 (2nd Cir. 1978), in which the Second Circuit held that a district court's disapproval of a settlement in a stockbroker's derivative action was not appealable. Adopting the rationale of the court in Seigal v. Merrick, supra, the Fourth

Circuit held that the disallowance of appeals from a refusal to enter a settlement had the "practical effect of enhancing the district court's control over the litigation." 606 F.2d at 423. It then quoted from Seigal the statement that

> (T)he denial of one compromise does not necessarily mean that a "sweetened" compromise may not be approved. The management of a derivative suit gives the trial judge a chance not only to disapprove a compromise but to edge the parties toward more equitable terms.

Id. at 423-424, quoting Seigal v. Merrick, supra, 590 F.2d at 39. On this basis it concluded that "(w)hatever the district court's reasons for refusing a decree, appeals of right . . . would encourage an endless string of appeals and destroy the district court's supervision of the action". 606 F.2d at 424.

For several reasons, the decision in Seigal v. Merrick, cannot be deemed dispositive of the issue presented here. First, the decision in Seigal was based upon §1291, not §1292(a)(1). Second, the appellant in Seigal had not been denied a request

for injunctive relief. Third, the district court's denial there of the proposed settlement had been based upon its assessment of the fairness of the settlement as determined by the date on which the value of an option was to be measured and by whether the value of the option was to be measured entirely by market considerations.

As a result of this posture of the case, the Second Circuit, as evidenced from its quotation of the admonition in Cooper & Lybrand v. Livesay, supra, 437 U.S. at 477, that "allowing appeals of rights from nonfinal orders that turn on the facts of a particular case thrusts appellate courts indiscriminately into the trial process", seemed to have regarded the district court's order as turning esssentially upon a factual assessment rather than a legal assessment.

In the instant action, however, the order of the district court was based entirely upon its misapprehension of applicable legal principles. The order thus fell in the category of cases in which the district court has an "erroneous belief in the existence of a legal barrier to its entertaining a claim for an injunction". Gardner v. Westinghouse Broadcasting Co., supra, 437 U.S. at

481, n.7. In such a case, the danger of serious harm resulting from a disallowance of an appeal "outweigh(s) the general undesirability of interlocutory appeals". Id.

As mentioned previously, the Fourth Circuit assumed that the decision of the district court would not prevent the emergence of a more "sweetened" compromise. This assumption, however, was directly contrary to the explicit statement of the district court that

> "When the parties have settled their differences without a violation of the law and without violating the right of any class members, the Court will enter an appropriate order . . . . But this Court will not, by entering the proposed Consent Decree provide the parties with a judicial licence to practice racial discrimination."

446 F.Supp. at 791.

In view of this conclusion of the district court, it was plain error for the Fourth Circuit to assume that the parties would be able to come up with a more sweetened compromise that would be satisfactory to the district court while simultaneously protective of petitioners'

interest in eradicating the adverse effects of segregated job classifications. For these reasons, the decision in Seigal v. Merrick is irrelevant to the present case.[22/]

In short, the decision below, whatever may be the general status of the appealability of orders refusing to approve proposed consent decrees or refusing to grant a permanent injunction, is an order which, as a practical matter, denied injunctive relief to petitioners on the ground that their claim was legally insufficient.

The Fourth Circuit also held that the consequence of the order did not produce any irreparable harm and that delayed review would not forfeit any of petitioners' rights. 606 F.2d at 423. This erroneous holding was based on a total misconception of the nature and effect of the district court's order. It ignores the parties'

22/ The rationale and the holding in Seigal are directly contrary to the rationale and holding of the Ninth Circuit in Norman v. Mckee, 431 F.2d 769 (9th Cir. 1970) cert. denied, 401 U.S. 912 (1971)

loss of the opportunity to settle the case on the same basis which this Court permitted the union and the employer to settle claims of discrimination against them in United Steelworkers of America, AFL-CIO-CLC v. Weber, supra.

The race-conscious affirmative action plan which this Court approved in Weber, supra, was the result of voluntary action taken by Kaiser Aluminum & Chemical Corp., and the United Steelworkers of America, AFL-CIO-CLC. It was, as is true here, designed to "break down old patterns of racial segregation and hierarchy", 443 U.S. at 208, and to "open employment opportunities for Negroes in occupations which have been traditionally closed to them."[23/] Id.

That affirmative action program, like the one here, did not "unnecessarily trammel the interests of white employees". Id. Like the present plan, it was a temporary effort intended to eliminate racial imbalance, and not to maintain racial balance. Private affirmative action plan satisfying

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23/ These comments were taken from the remarks of Senator Hubert Humphrey, 110 Cong. Rec. 6548.

balance. Private affirmative action plan satisfying these criteria can, under Weber, supra, be put into place without fear of unncessary judicial intervention on behalf of third parties who claim rights denied by the Court in Weber, supra. Judicial action resulting in the deprivation of this right constitutes irreparable injury for which petitioners have no other means of obtaining redress other than by taking an interlocutory appeal.

Moreover, it is evident that, if petitioners are forced to go to trial, the right to settle the case before trial will be irretrievably lost. As a consequence, petitioners will be compelled to undergo the burdens of an unnecessary, expensive, and time-consuming trial. Furthermore, such a trial is likely to be disruptive to the preservation of industrial peace and tranquility in the workplace. This is an interest which the Congress, by expressing a preference for voluntary settlements, see Alexander v. Gardner-Denver Co., supra, 415 U.S. at 44, was obviously seeking to foster.

The order of the district court threatens these vital interests. Its direct effect is to force petitioners to yield rights granted under

this Court's decision in Weber, supra. It thus causes irreparable injury to petitioners and class members. The allowance of an appeal from the district court's order is the only means available for ameliorating the damage caused by the order. Petitioners' appeal therefore should not be dismissed.

CONCLUSION

For the reasons indicated herein the decision below should be vacated with instructions to allow the appeal.

Respectfully submitted,

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